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OFFICE OF PETITIONS

In re Application of :
Robert Michael Denton :
Application No. 10/625,858 : DECISION DISMISSING
Filed: 23 July, 2003 : PETITION
Attorney Docket No. 775-004 :

This is a decision on the petition styled as a petition for correction of the filing date, which is treated as a petition filed under 37 CFR 1.10 on 18 August, 2003, requesting that the above-identified application be accorded a filing date of 22 July, 2003, rather than the presently accorded filing date of 23 July, 2003.

The petition is dismissed.

Petitioners allege that the application was deposited in Express Mail Post Office to Addressee service on 22 July, 2003. In support, petitioners have provided an affidavit of counsel's legal secretary and administrator, Robin C. Dennis, stating that she deposited the application papers with the USPS, apparently via an Express Mail Drop Box, prior to the last pickup of the day, on 22 July, 2003.

Paragraph (a) of 37 CFR 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date.¹
(emphasis added)

¹See 37 CFR 1.6(a).

Paragraph (c) of 37 CFR 1.10 states that:

Any person filing correspondence under 37 CFR 1.10 that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show a discrepancy between the filing date accorded by the Office to the correspondence and the date of deposit as shown by the "date-in" on the "Express Mail" mailing label or other USPS notation, may petition the Commissioner to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;

(2) The number of the "Express Mail" mailing label was placed on the papers or fees that constitute the correspondence prior to the original mailing by "Express Mail;" and

(3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in," and of any other official notation by the USPS relied upon to show the date of deposit.

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to

this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Any statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in § 10.1(r) of this chapter.

At the outset, the petition lacks the showing required by 37 CFR 1.10(c)(2) and (d)(2), as a search of the official file reveals that petitioner failed to place the Express Mail label number on the originally filed specification and claims, drawings, and transmittal sheet. A review of the original application papers in the official file reveals that no Express Mail Label Number was placed thereon.

The placement of the Express Mail label number on a paper ties the paper to a single, identifiable Express Mail receipt. Where questions are later raised concerning the filing date of the paper, the USPTO may require the applicant to supply a copy of the Express Mail receipt identified on the paper in order to verify the mailing date. Where no Express Mail label number is identified on a paper, the USPTO has no way of independently associating the paper with any particular Express Mail receipt.

The difficulty caused by an applicant's failure to place an Express Mail label number on a paper is clearly illustrated by this case. Since no Express Mail label number was placed on the application papers prior to mailing, the USPTO has nothing in its control from the filing date of the papers to independently corroborate the applicants' assertion that the application was filed on 22 July, 2003.

In regards to paragraph (3) of 37 CFR 1.10(c) above, petitioners have not submitted a true copy of the "Express Mail" mailing label showing the "date-in" and any other official notation by the USPS relied upon to show the date of deposit. A copy of the "Express Mail" mailing label must be included with any renewed petition under 37 CFR 1.10(c). It is noted that no mention of any Express Mail number has been made in the application papers filed on 23 July, 2003, or the present petition.

Furthermore, assuming, *arguendo*, that petitioners had placed the Express Mail number on the application papers prior to filing them in the USPTO, the petition lacks the showing required by item 37 CFR 1.10(d)(3) above. Petitioners have not presented any

corroborating evidence that the correspondence was deposited in Express Mail service prior to the last scheduled pickup for that day. If the error was due to the USPS entering the wrong date on the Express Mail label, petitioners should request a letter from the USPS stating that the correct date of deposit is 22 July, 2003, and explaining why the error occurred. Additionally, petitioners may provide evidence that came into being after deposit and within one business day of deposit of the application in Express Mail. Such evidence may include a mail log with an entry made after the application was deposited in Express Mail, or a letter to the client sent after the mailing of the application confirming the mailing of the application.

In this regard, the affidavit of counsel's secretary, Ms. Dennis, is insufficient as proof that the application was deposited on 22 July, 2003, because the affidavit was made more than one business day after the date the application was purportedly deposited in Express Mail.

Any request for reconsideration (no further petition fee is required) must be filed within TWO MONTHS of the date of this decision in order to be considered timely [37 CFR 1.181(f)]. The request should be addressed as follows:

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By FAX: (703)308-6916
Attn: Office of Petitions

By hand: Crystal Plaza Four, Suite CP4-3C23
2201 South Clark Place
Arlington, VA 22202

As no petition fee is required for a petition under 37 CFR 1.10, the petition fee of \$130.00 will be credited to counsel's deposit account, No. 19-4430, as requested.

The application is being forwarded to the Office of Initial Patent Examination for further processing.

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Telephone inquiries concerning this matter may be directed to the undersigned at (703)308-6918.

A handwritten signature in black ink, appearing to read "D. Wood", written in a cursive style.

Douglas I. Wood
Senior Petitions Attorney
Office of Petitions